Supreme Court, U.S.
FILED
JUN 10 1993
OFFICE OF THE CLERK

No. 92-1820

In The

Supreme Court of the United States

October Term, 1992

JACK J. GRYNBERG,

Petitioner,

vs.

CITY OF NORTHGLENN, COLORADO,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HERBERT C. PHILLIPS
Counsel of Record
JAMES S. MALONEY
HAYES, PHILLIPS & MALONEY, P.C.
1350 17th Street, Suite 450
Denver, CO 80202-1517
Telephone: (303) 825-6444

Attorneys for Respondent
City of Northglenn, Colorado

JUNE 10, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING BEFORE THE SUPREME COURT, STATE OF COLORADO

Jack J. Grynberg

Phillip D. Barber, Esq.
Keith D. Tooley, Esq.
Welborn, Dufford, Brown & Tooley, P.C.
1700 Broadway, Suite 1700
Denver, CO 80290-1701

City of Northglenn

Herbert C. Phillips, Esq.
James S. Maloney, Esq.
Hayes, Phillips & Maloney, P.C.
1350 17th St., Suite 450
Denver, CO 80202-1517

Amicus Curiae City and County of Denver, acting by and through its Board of Water Commissioners

Patricia L. Wells, Esq.
Casey S. Funk, Esq.
1600 West 12th Avenue
Denver, CO 80254

Amicus Curiae Colorado Municipal League

Kathleen E. Haddock, Esq.
1660 Lincoln St., Suite 2100
Denver, CO 80264

Amicus Curiae Independent Petroleum Association of Mountain States

Peter J. Wall, Esq.
John D. Amen, Esq.
Burns, Wall, Smith and Mueller, P.C.
303 East 17th Avenue, Suite 800
Denver, CO 80203

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

1. Nature of the Case 1

2. The Course of Proceedings 2

3. Statement of the Facts 6

REASONS WHY THE PETITION SHOULD BE DENIED 9

1. The decision of the Colorado Supreme Court turned on issues of state, not federal, law 9

2. The decision of the Colorado Supreme Court in this case was entirely consistent with the recent "takings" decisions of this Court 15

3. The criteria for granting certiorari, as set forth in Rule 10.1, have not been met 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) 18

City of Northglenn, Colorado v. Grynberg, 846 P.2d 175 (Colo. 1993) ..... *passim*

Grynberg v. City of Northglenn, 703 P.2d 601 (Colo. App. 1985) 3, 4, 6, 8, 10

Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987) ..... *passim*

Grynberg v. City of Northglenn, 829 P.2d 473 (Colo. App. 1991) 11

Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) 19

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) 18

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 12

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) 18

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) 10, 13, 15, 16, 20

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) 17

Paterno v. Lyons, 334 U.S. 314, 68 S.Ct. 1044, 92 L.Ed. 1409 (1948) 12

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) 18

Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 302 U.S. 506, 58 S.Ct. 295, 82 L.Ed. 392 (1938) 12

Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991) 19

Yee v. City of Escondido, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) 16

CONSTITUTION

United States Constitution Amendment V . 6, 11, 12, 18

United States Constitution Amendment XIV 6

STATUTES

Colo. Const. art. II, § 15 .....5, 11

Colo. Rev. Stat. § 24-10-101 to 120 (1988 Repl. Vol.) . . .2, 4

Colo. Rev. Stat. § 34-1-303 (1984 Repl. Vol.) 7

Colo. Rev. Stat. § 34-1-305 (1984 Repl. Vol.) 7

Colo. Rev. Stat. § 37-87-105 (1990 Repl. Vol.) 7

Colo. Rev. Stat. § 37-87-117 (1990 Repl. Vol.) 7

Colo. Rev. Stat. § 38-35-109(1) (1982) 3

MISCELLANEOUS

2A *Nichols on Eminent Domain* § 6.26 (1990) 11

Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar. Assn. Q. 393, 399-400 (1960) 13

No. 92-1820

In The

Supreme Court of the United States

October Term, 1992

JACK J. GRYNBERG,

Petitioner,

vs.

CITY OF NORTHGLENN, COLORADO,

Respondent.

On Petition For Writ Of Certiorari
To The Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition presents no issue that warrants this Court's consideration and accordingly should be denied. The Colorado Supreme Court's opinion for which review is sought is reported at 846 P.2d 175 (Colo. 1993).

STATEMENT OF THE CASE

1. Nature of the Case.

Petitioner Jack J. Grynberg ("Grynberg") seeks review on certiorari of the decision of the Colorado Supreme Court in the case of *City of Northglenn, Colorado v. Grynberg*, 846 P.2d 175 (Colo. 1993) (hereafter "*Grynberg*

II"), in which the Colorado Supreme Court held that a coal lease owned by Grynberg had not been "taken or damaged" within the meaning of Article II, Section 15 of the Colorado Constitution. Respondent City of Northglenn, Colorado ("Northglenn") respectfully disagrees with Grynberg's characterization of this case as "an inverse condemnation case." *Pet. for Writ of Cert.* at 3. In fact, as the Colorado Supreme Court implicitly held, this is a state law tort claim, sounding in trespass, masquerading as a "takings" claim in order to avoid the effect of Colorado's Governmental Immunity Act. Colo. Rev. Stat. §§ 24-10-101 to 120 (1988 Repl. Vol.).

2. The Course of Proceedings.

Grynberg initially brought suit against Northglenn and several private contractors in 1978 in the District Court in and for the City and County of Denver. This suit was "based on theories of trespass, assumpsit, wrongful appropriation of geologic information, interference with prospective business advantage and negligence." *Grynberg v. City of Northglenn*, 739 P.2d 230, 233 (Colo. 1987) (hereinafter "*Grynberg I*"). "The asserted injury that provide[d] the principal basis for all of these claims, directly or indirectly, [was] the loss of market value of Grynberg's coal lease as the result of the discovery and publication of information that the coal reserves on the property have no commercial value." *Id.*

The district court dismissed Grynberg's complaint on summary judgment holding that Grynberg's failure to record the coal lease, which he had acquired from the State of Colorado, rendered the lease ineffective as to the

defendants. The Colorado Court of Appeals affirmed. *Grynberg v. City of Northglenn*, 703 P.2d 601 (Colo. App. 1985). The Colorado Supreme Court reversed, holding that: (i) the Colorado Recording Act, Colo. Rev. Stat. § 38-35-109(1) (1982), did not protect the defendants; (ii) the permission obtained by Northglenn from the owner of the surface estate was insufficient to authorize Northglenn to drill in search of mineral deposits; and (iii) the tort of geophysical trespass would be recognized in Colorado. The Court then remanded the case to the trial court, specifically stating as follows:

> We hold that the trial court erred in granting summary judgment for the defendants. Grynberg invites us to go on to direct that summary judgment be entered in his favor determining that liability has been established with respect to the claims embraced in his motion for partial summary judgment. We decline this invitation. The trial court has not had an opportunity to delineate the elements of each of Grynberg's claims for relief or the extent to which factual issues relevant to those elements might remain unresolved. The possibility of the existence of affirmative defenses, such as governmental immunity, also remains unexplored. Additionally, our grant of certiorari was not sufficiently expansive to permit full consideration of all of Grynberg's claims for relief. Under these circumstances, we are persuaded that the interests of justice will be best served by returning this matter to the trial court for definition and resolution of all issues remaining

> unresolved as a result of our reversal of the summary judgments for the defendants.

Grynberg I, 739 P.2d at 239.[1]

Upon remand, Northglenn again moved for summary judgment in its favor dismissing all of the tort claims brought by Grynberg pursuant to the Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-101 to 120 (1988 Repl. Vol.) (the "GIA"). The trial court granted this motion and further dismissed all claims against the other Defendants to the extent that their actions were not independently tortious. Grynberg thereupon made his election of remedies voluntarily abandoning his tort claims, including any claim based on the tort of "geophysical trespass" recognized by the Colorado Supreme Court in *Grynberg I*, and proceeded on a theory of inverse condemnation.

Trial was held and the jury returned a verdict in favor of Grynberg of $646,930 to which the trial court added costs, attorney fees and interest for a total of $862,155.05. Northglenn appealed to the Colorado Court of Appeals, arguing that the trial court had erred in: (i) finding a "taking" of private property within the meaning of Article II, Section 15 of the Colorado Constitution; (ii) holding the evidence presented to the jury sufficient

---

[1] The express terms of the Court's remand are important because Grynberg has repeatedly represented or implied both to the trial court, to the Colorado Court of Appeals, the Colorado Supreme Court, and now to this Court that the Court in *Grynberg I* found a "taking" within the meaning of Colorado's "Just Compensation Clause." Justice Erickson of the Colorado Supreme Court, in his special concurrence in *Grynberg II*, stated on this point that "Grynberg mischaracterizes our holding in *Grynberg I*." 846 P.2d at 188.

in law and fact to support the verdict; (iii) admitting evidence bearing on issues other than just compensation; and (iv) awarding Grynberg interest and attorney fees.

Grynberg cross-appealed arguing that the trial court erred in: (i) denying Grynberg pre-judgment interest during the period prior to the transfer of the case to Weld County District Court; and (ii) not awarding Grynberg the full amount of attorney fees requested.

The Colorado Court of Appeals affirmed the trial court in all respects. *Grynberg v. City of Northglenn*, 829 P.2d 473 (Colo. App. 1991).

Northglenn petitioned the Colorado Supreme Court for certiorari and Grynberg filed a cross-petition. The Colorado Supreme Court granted certiorari on three issues. The precise phrasing of the issues considered by the Colorado Supreme Court is important since it bears heavily on the propriety of granting certiorari in this Court.

> We granted Northglenn's petition for writ of certiorari on two issues: (1) whether the court of appeals erred in holding that the inability to mine under the reservoir and its embankment, the drilling of test holes, and the filing of a report *constitute a taking within the meaning of Article II, Section 15 of the Colorado Constitution;* and (2) whether the court of appeals erred in finding the evidence presented at trial was sufficient in law and fact to support the jury's verdict. We also granted Grynberg's cross-petition for writ of certiorari on the issue of *whether Article II, Sections 15 and 25, of the Colorado Constitution require* that the prejudgment interest awarded to Grynberg on his inverse condemnation judgment be calculated from the date of the

> taking of his property by the City of Northglenn. Because we conclude that there was no constitutional taking or damaging, we reverse on the first issue and do not address the other two issues.

Grynberg II, 846 P.2d at 177-178 (emphasis added). Reference to Amendments V and XIV of the United States Constitution is conspicuous by its absence for reasons which will be addressed more fully below.

A unanimous Colorado Supreme Court, with two of the seven justices specially concurring, held as follows:

> We conclude that Grynberg did not prove a taking or damaging of his property pursuant to Article II, Section 14 of the Colorado Constitution, by Northglenn's acquisition of the surface estate, the drilling, or the publication of the Chen report. Because there was no taking or damaging of Grynberg's property, we reverse the judgment of the court of appeals and remand the case with directions to return the case to the district court for the dismissal of Grynberg's inverse condemnation action.

846 P.2d at 185.

3. Statement of the Facts.

Most of the facts pertinent to this case are undisputed and are set forth in the opinions of the Colorado Supreme Court in *Grynberg I* and *Grynberg II* and need not be repeated here. Certain inaccuracies in the recitation of facts contained in Grynberg's Petition for Writ of Certiorari must, however, be corrected.

In late 1977, Northglenn began a search for potential sites for a wastewater treatment facility and associated reservoir to serve Northglenn's 30,000 residents with sewage treatment services. One of the sites considered was located on the West half of Section 36, Township 1 North, Range 68 West of the 6th P.M., in Weld County, Colorado (the "Site"). Under pertinent state statutes Northglenn was required, prior to construction of the reservoir, to determine whether the site contained commercial deposits of minerals.[2]

In order to ascertain the ownership of the Site, Northglenn searched the Weld County records and learned that the severed mineral estate to Section 36, Township 1 North, Range 68 West of the 6th P.M. ("Section 36"), including the Site, was owned by the State of Colorado. Northglenn also learned that the State had issued a coal lease for Section 36 to the Clayton Coal Company which had assigned the lease to Adolph Coors Company which "had determined that any coal within the leasehold boundaries was not economically recoverable, and that Coors therefore had abandoned the coal lease." *Grynberg I*, 739 P.2d at 232.

What Northglenn did not learn, due to Grynberg's failure to record any evidence of his interest in Section 36,

---

[2] *See* Colo. Rev. Stat. §§ 34-1-303, -305(1) and (2) (1984 Repl. Vol.) (prohibiting governmental zoning authorities in populous counties from permitting use of any area containing a commercial mineral deposit in a manner that would interfere with extraction of such deposit); Colo. Rev. Stat. §§ 37-87-105(1) and -117 (1990 Repl. Vol.) (requiring state engineer's approval of engineering data and plans before certain dams may be constructed).

was that in July of 1977, Grynberg had "leased the right to explore for coal in Section 36 (640 acres of land) for $640 per year from the State of Colorado." *Grynberg II*, 846 P.2d at 178.

With the permission of the owner of the surface estate, Northglenn's independent contractors conducted the drilling required by state law and, based on the results, filed in the office of Colorado's State Engineer what has been referred to as the "Chen Report" which concluded that " 'it is our opinion that the coal in Section 36 . . . does not represent a potentially recoverable resource.' " *Grynberg I*, 739 P.2d at 233.

Grynberg states that following the filing of the Chen Report "Northglenn then purchased the surface overlying Grynberg's lease and began planning and construction of its reservoir." *Pet. for Writ of Cert.* at 5. In actuality Northglenn, on June 1, 1978, purchased only 320 acres (the West half of Section 36) of the 640 acres subject to Grynberg's coal lease and the proposed reservoir was to occupy only about a quarter of Section 36.

Moreover, Grynberg neglects to advise the Court of several other critical facts, the most important of which is that "[b]y the time Northglenn began site preparation for the reservoir, Grynberg had conveyed the mineral lease to his wife who is not a party to this action." *Grynberg II*, 846 P.2d at 181. As the Colorado Supreme Court observed:

> Northglenn's acquisition of the surface estate had absolutely no effect on Grynberg's property rights as lessee of the mineral estate because Grynberg was not prevented from exploring or mining coal lying under the proposed site of the reservoir. The surface estate was cultivated

> farmland both before and after it was purchased by Northglenn.

Id. This is not, as Grynberg intimates, a case where a city has constructed a reservoir and effectively precluded subsurface mining. During the entire term of his lease Grynberg was legally entitled and physically able to mine coal anywhere under Section 36 but chose not to do so. The construction of a reservoir on a portion of Section 36 after he conveyed away his coal lease is, as the Colorado Supreme Court concluded, irrelevant.

Finally, Grynberg suggests in his Petition for Writ of Certiorari that Northglenn "destroyed the value of Grynberg's property rights." *Pet. for Writ of Cert.* at 9. The record below contains no such finding nor can such a finding be inferred since the amount of coal under Section 36 never changed and Grynberg was, indisputably, legally and physically able to explore and mine the coal at any time during the term of his leasehold. Indeed the jury in this case was instructed to determine "the amount of the *reduction in value,* if any, of Mr. Grynberg's coal lease as a result of the actions of the city alleged in this case." Jury Instruction No. 10 (emphasis added). This instruction is, of course, inconsistent with Grynberg's representation that his lease had been rendered entirely valueless. This point will be discussed in greater detail below.

REASONS WHY THE PETITION SHOULD BE DENIED

Grynberg's Petition for Writ of Certiorari should be denied because: (i) the decision of the Colorado Supreme

Court turned on issues of state, not federal, law; (ii) the decision of the Colorado Supreme Court is entirely consistent with the recent "takings" decisions of this Court; and (iii) the criteria for granting certiorari, as set forth in Rule 10.1, have not been met. Each of these reasons will be separately addressed.

1. The decision of the Colorado Supreme Court turned on issues of state, not federal, law.

Reduced to its essence, the Colorado Supreme Court's decision in *Grynberg II* holds that Grynberg's remedy, if any, lies in the tort of geophysical trespass first recognized in Colorado in *Grynberg I*,[3] and that Grynberg's coal lease was not "taken or damaged" within the meaning of Article II, Section 15 of the Colorado Constitution. These are, of course, matters of state law.

Significantly, not once during the briefing in the Colorado Supreme Court did Grynberg cite to this Court's decision in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Yet he now complains that "while that decision [*Grynberg II*] gives lip service to *Lucas*, the practical reality of the ruling is that the Colorado Supreme Court has ignored it completely." *Pet. for Writ of Cert.* at 20.

---

[3] "In *Grynberg I*, we merely held that a geophysical trespass was actionable. *Grynberg I*, 739 P.2d at 239. The proper claim for the invasion of the property interest and the publication of the information does not lie in inverse condemnation, but rather should be brought in trespass or another action in tort." *Grynberg II*, 846 P.2d at 188 n. 6 (Erickson, J., specially concurring).

Similarly, Grynberg cited to Amendment V only twice (once in a parenthetical and once in relation to his request for prejudgment interest) in his Opening Brief in the Colorado Supreme Court and not at all in his Reply Brief. Yet he now suggests that this Court should grant certiorari because "[t]he decision of the Colorado Supreme Court is a decision on an important issue of federal law. . . . " *Id.* at 14.

Quite simply, from trial onward, the parties to this case recognized that no traditional "taking" had occurred in this case pursuant to Amendment V and that this case turned on the fact that the Colorado Constitution requires just compensation where private property is "taken *or damaged*" for public use. Art. II, Sec. 15, Colo. Const. (emphasis added).[4] The "or damaged" clause of Article II, Section 15 was clearly the rationale for the Court of Appeals' decision in *Grynberg v. City of Northglenn*, 829 P.2d 473 (Colo. App. 1991)[5] which explains why the Colorado Supreme Court, in granting certiorari, limited its

---

[4] Colorado's "just compensation" clause, requiring compensation where private property is "damaged" for public use is modeled after a similar provision in the Constitution of Illinois and is now contained in the constitutions of some 25 states. 2A *Nichols on Eminent Domain* § 6.26 (1990).

[5] The Colorado Court of Appeals explained its decision thusly:

> Colo. Const. art. II, § 15 provides that '[p]rivate property shall not be taken *or damaged*, for public or private use, without just compensation.' To proceed on a claim of inverse condemnation, a plaintiff must show a taking of, or damage to, property for a public purpose without just compensation by a government or public entity which has the power of eminent domain but has refused to exercise it.
>
> * * *

writ to consideration of Article II, Section 15. This is why the Colorado Supreme Court devoted considerable discussion to the distinction between Colorado's just compensation clause and traditional "takings" clauses, explaining that "[i]t has been said that by including damaging in the just compensation provision, the Colorado Constitution affords an aggrieved property owner a greater measure of protection than does the Constitution of the United States." *Grynberg II*, 846 P.2d at 179.

Thus, the decisions below turned entirely on issues of state law and, specifically, on the meaning of the "or damaged" provision of Article II, Section 15 of the Colorado Constitution. This Court has consistently held that a state supreme court is the ultimate tribunal in construing the meaning of a state constitution and that this Court cannot, and will not, review a decision of a state court with respect to a question arising under the state constitution. *See In re Murchison*, 349 U.S. 133, 135, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (Michigan Supreme Court's interpretation of Michigan Constitution binding on United States Supreme Court); *Paterno v. Lyons*, 334 U.S. 314, 319 68 S.Ct. 1044, 1046, 92 L.Ed. 1409, 1414 (1948); *Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 302 U.S. 506, 512, 58 S.Ct. 295, 298, 82 L.Ed. 392, 396 (1938).

> Thus, contrary to the City's assertion, physical ouster is not required in order for plaintiff to state a claim for relief in inverse condemnation proceedings. All plaintiff is required to show is a legal interference that substantially impairs his use or possession of the property. . . .

829 P.2d at 475 (citations omitted).

The considerations governing the review of state court decisions by this court have been summarized by Justice Brennan as follows:

> Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treaties. But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. *First*, the federal question must be a substantial question. *Second*, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. *Third*, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law.

Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar. Assn. Q. 393, 399-400 (1960).

Here, any federal question under Amendment V was insubstantial and clearly ancillary to the analysis of the "or damaging" provision of the Colorado Constitution. The federal question was not properly raised in the state court. Indeed Grynberg never even cited to the Colorado Supreme Court the *Lucas* case which he now claims requires reversal of its decision. *Lucas*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

Finally, and perhaps most importantly, the state court's judgment can be sustained on an independent ground of state law, as the Colorado Supreme Court specifically noted:

> Even if we did conclude that the acquisition of the surface brought about a taking (or damaging) of Grynberg's coal lease to the extent that it was forced to support a reservoir, we could not affirm the trial court's judgment. There was no evidence before the jury as to how much coal from a hypothetical mining operation under section 36 would be required to remain in place to support a reservoir as then proposed by Northglenn; the jury's valuation, to the extent the acquisition of the surface allegedly was a taking, was purely speculative.

Grynberg II, 846 P.2d at 181 n. 7. Since the state supreme court has already stated that reversal was required as a matter of state law, any consideration by this Court of the ancillary federal question is an exercise in futility since it will not change the result.

Reading Grynberg's Petition, it becomes clear that his primary contention is that the Colorado Supreme Court failed to understand the *facts* of this case.[6] Northglenn disagrees. The point, however, is that this Court should only grant certiorari where a state court of last resort has misconstrued the Constitution or federal law, not the facts of the case.

---

[6] Some sample quotations including the following: "In order to justify its ruling the Colorado Supreme Court attempted to rewrite the actual evidence presented at trial." *Pet. for Writ of Cert.* at 17. "This holding was completely at odds with the proof at trial. . . . " *Id.* "Nor was there any factual predicate for the Colorado Supreme Court's conclusion. . . . " *Id.* The "opinion is rife with unsubstantiated factual determinations and findings which are inconsistent with the facts as outlined in *Grynberg I*. . . . "*Id.* at n. 5. "This remarkable misstatement is confounding. . . . " *Id.* at 18.

This case was briefed, argued and decided as a state law case. Even if "a federal question lurks in the case," it does not warrant an exercise of certiorari jurisdiction by this Court.

2. The decision of the Colorado Supreme Court in this case was entirely consistent with the recent "takings" decisions of this Court.

Grynberg asks this Court to grant his Petition for Writ of Certiorari on two bases:

> This Court should accept Grynberg's petition for two important reasons. First, this case gives the Court an opportunity to explain how its decision in *Lucas* would apply to a physical taking of mineral property rights. Secondly, the decision of the Colorado Supreme Court must be reversed because, while that decision gives lip service to *Lucas*, the practical reality of the ruling is that the Colorado Supreme Court has ignored it completely. Even though Grynberg has suffered "the loss of all economically beneficial productive use of [his] land", Grynberg receives no compensation whatsoever.

Pet. for Writ of Cert. at 20. Grynberg's reliance on *Lucas* is misplaced for several reasons.

First, *Lucas* was a regulatory taking case, but here Northglenn passed no laws or regulations limiting or restricting Grynberg's use of his coal lease. Indeed Section 36 was, at all relevant times, part of unincorporated Weld County. It was not part of Northglenn, nor was it

subject to its regulatory authority. Thus, Grynberg's contention must, if anything, be that Northglenn's preconstruction planning activities relating to the Site constituted a physical taking governed by such cases as this Court's recent decision in *Yee v. City of Escondido, California*, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). In *Yee*, this Court held that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." 112 S.Ct. at 1528 (emphasis in original).

Under the undisputed facts of this case, Northglenn never occupied Grynberg's coal lease at all.

> From the time that Grynberg obtained the coal lease until the time that he conveyed the coal lease to his wife, the surface was used as agricultural land. Northglenn did nothing which would have impaired Grynberg's exploration for or mining of coal in the coal lease.

Grynberg II, 846 P.2d at 185. Thus, there was no physical taking.

Second, even if the *Lucas* decision regarding regulatory takings was applicable to a purported physical taking, the *Lucas* decision was specifically premised on the undisputed fact that Lucas' property had been "rendered valueless." 112 S.Ct. at 2896. This fact brought the *Lucas* case squarely within this Court's "frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." 112 S.Ct. at 2895 (emphasis in original).

By contrast, in this case there has never been a determination that Northglenn somehow deprived Grynberg of all economically beneficial use of his coal lease. Far from it. Whatever coal is in Section 36 remains there and Grynberg could have mined it at any time during the term of his leasehold. The Chen Report merely confirmed publicly available information regarding the limited amount of coal underlying Section 36.[7] As the Colorado Supreme Court held:

> [W]e determine that Grynberg has not made out a case showing a constitutional damaging of his property. While it does appear that his coal lease was diminished in value, this is not sufficient.

Grynberg II, 846 P.2d at 184-185. This conclusion is entirely consistent with this Court's ruling in *Lucas* and with the takings decisions of this Court requiring compensation only where government regulation denies all economically beneficial or productive uses of land. *See e.g. Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834,

---

[7] After summarizing the evidence on this point, the Colorado Supreme Court stated as follows:

> Thus, the conclusion reached by the Chen report that coal mining under Section 36 was not commercially feasible was not based on proprietary or secret information gained as a result of the exploratory hole drilled by Chen in Section 36. The same basic information was contained in the Bureau of Mines report, as well as the USGS and Coors drilling logs, and Grynberg has failed to prove that the Chen report infringed on a trade secret or on otherwise exclusive proprietary information.

Grynberg II, 846 P.2d at 184.

107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987);[8] *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

Applying the takings jurisprudence of this Court to the facts of this case as set forth in *Grynberg I* and *Grynberg II* it is clear that the decision of the Colorado Supreme Court is entirely consistent with the decisions of this Court and that certiorari review is inappropriate.

3. The criteria for granting certiorari, as set forth in Rule 10.1, have not been met.

Grynberg's Petition for Writ of Certiorari falls within none of the considerations governing the granting of a writ of certiorari enunciated by this Court in Rule 10.

Rule 10.1(a) applies only to the United States courts of appeals and is not relevant here.

Rule 10.1(b) states that certiorari will be considered "[w]hen a state court of last resort has decided a federal

---

[8] While Grynberg repeatedly cites Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), not once does he cite the much more recent and pertinent decision of this Court in *Keystone, supra*, holding that Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, which required the petitioners to leave some 27 million tons of coal in place beneath certain public buildings, dwellings and cemeteries did not constitute a taking under Amendment V.

question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals." Grynberg has cited to no state court decisions which purportedly conflict with the Colorado Supreme Court's decision in *Grynberg II*. His suggestion that the *Grynberg II* decision is "at odds" with two federal cases is flatly incorrect.[9] *Pet. for Writ of Cert.* at 15.

This leaves the final consideration of whether the *Grynberg II* decision has "decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Rule 10.1(c).

As discussed above, the Colorado Supreme Court's decision in *Grynberg II* did not "decide[] an important question of federal law" at all, turning as it did on questions of state law. Certainly it did not decide "any federal

---

[9] *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991) was never cited by Grynberg in the Colorado Supreme Court briefing. The case involved a specific statutory prohibition which precluded surface mining of coal in alluvial valley floors and was "fact-specific." *Id.* 926 F.2d at 1171. Obviously, Northglenn never enacted any law or regulation prohibiting Grynberg from mining his coal since Section 36, located outside Northglenn's boundaries, was not within Northglenn's regulatory jurisdiction.

Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) involved physical occupation of and damage to the surface estate. There is no indication that the plaintiff in *Hendler* even owned the mineral estate. The Colorado Supreme Court correctly concluded that *Hendler* was not "on point." *Grynberg II*, 846 P.2d at 182 n. 9.

question in a way that that conflicts with applicable decisions of this Court." As discussed above, the Colorado Supreme Court specifically considered this Court's ruling in *Lucas* (despite Grynberg's failure to cite that decision even once), and its decision is entirely consistent with the takings jurisprudence of this Court.

Grynberg has met none of the Rule 10 conditions governing the granting of certiorari.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HERBERT C. PHILLIPS
Counsel of Record
JAMES S. MALONEY
HAYES, PHILLIPS & MALONEY, P.C.
1350 17th Street, Suite 450
Denver, CO 80202-1517
Telephone: (303) 825-6444

Counsel for Respondent
City of Northglenn, Colorado

June 11, 1993